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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 236

MILES EDWARD HAYNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The district court filed no opinion. The opinion of the Court of Appeals (R. 11-15) is reported at 372 F.2d 651.

Jurisdiction

The judgment of the Court of Appeals (R. 16) was entered on February 14, 1967. The petition for writ of certiorari was filed on March 11, 1967, and was granted on June 12, 1967. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Does the Fifth Amendment privilege against self-incrimination bar criminal conviction of a person under 26 U.S.C. §5851 for possession of a firearm that had not been registered as required by 26 U.S.C. §5841?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions directly applicable to this case are set forth below. Other related statutory provisions are reproduced in Appendix A, at p. 21.

United States Constitution, Amendment V: No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

United States Code, title 26, §5841: Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

United States Code, title 26, §5851: It shall be unlawful for any person to receive or possess any firearm which

has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

STATEMENT OF THE CASE

On March 4, 1966, an information was filed in the District Court for the Northern District of Texas charging petitioner, in separate counts, with three offenses under the National Firearms Act (R. 3-4). Only Count II of the information is now relevant. It charged:

> That on or about February 8, 1965, in Dallas, Dallas County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, knowingly and unlawfully possessed a firearm as defined by Section 5848(1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12-5/16 inches, stock cut off, overall length 20⅜ inches, Serial No. 759885, which firearm had not been registered with the Secretary of the Treasury or his delegate, that is, the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D.C., as required by Section 5841, Title 26, United States Code, and section 179.98 of Title 26 Code of Federal Regulations, Part 179.

On March 10, 1966, the court-appointed attorney for petitioner moved to dismiss Count II of the information on the ground that 26 U.S.C. §5851, which charges an offense with respect to 26 U.S.C. §5841, is unconstitutional and could not support the challenged count of the information (R. 5). The trial court denied the motion on March 25th (R. 6-7). On March 28th petitioner pleaded guilty to Count II of the information and was sentenced to four years in prison (R. 8-9). At the same time Counts I and III of the information were dismissed by the court on motion of the United States Attorney (R. 9). The trial court granted leave to appeal *in forma pauperis* and appointed counsel to represent petitioner on appeal. A timely appeal was taken to the Court of Appeals for the Fifth Circuit, and that court, on February 14, 1967, affirmed the conviction (R. 16).

SUMMARY OF ARGUMENT

The provision of 26 U.S.C. §5841 requiring registration of firearms has been held unconstitutional by courts of appeals on grounds not challenged by the government. Those decisions are clearly right, since §5841 requires registration only by a possessor of a firearm that has been made or transferred in violation of federal law, and another statute, 28 U.S.C. §5851, makes it a crime to possess a firearm that has been made or transferred in violation of federal law. Thus only those persons who are violating §5851 are required to register under §5841, and registration is inevitably incriminating.

The present prosecution is under another clause of §5851 making it a crime to possess a firearm that has not been

registered under §5841. Since registration would be incriminating, the result is to punish the possessor for his refusal to incriminate himself. Such a result is inconsistent with the Fifth Amendment. The statute requires registration by every possessor, and the relevant Treasury Regulation makes it clear that a possessor must register unless the firearm is already registered "to him." Thus registration by some prior possessor does not remove the obligation on the present possessor to register, and it is only his failure to register that is involved in a prosecution under the registration clause of §5851.

It is unconstitutional to prosecute the possessor of a firearm under §5841 for failing to register it. It is equally unconstitutional to prosecute a person under §5851 for possession of a firearm that he has not registered under §5841.

ARGUMENT

Although the National Firearms Act was enacted by virtue of the taxing power, and upheld on that ground, *Sonzinsky* v. *United States*, 300 U.S. 506 (1937), it is clear that, as a Senate committee has since declared: "The primary purpose of that act was to make it more difficult for the gangster element to obtain certain types of weapons. The type of weapon with which these provisions are concerned are the types it was thought would be used primarily by the gangster-type element." S. Rep. No. 1303, 86th Cong., 2d Sess. (1960). This is a worthy goal, and no challenge is made here of the use of the taxing power to achieve it. However, this goal may not be attained by provisions that compel an individual to come forward and

confess his own guilt or face a criminal prosecution for his failure to do so.

The statutory framework of the National Firearms Act can be described as follows. "Firearm" is given a quite arbitrary definition, 26 U.S.C. §5848(1), intended to include, so far as possible, the kinds of weapons used by the criminal element, such as sawed-off shotguns or machine guns, while excluding those popular with the sportsman. A heavy tax is imposed on the making, 26 U.S.C. §5821, or transfer, 26 U.S.C. §5811, of a firearm as so defined.[1] Every person possessing a firearm is required to register, unless the firearm has been made, transferred, or imported in compliance with the provisions of the act. 26 U.S.C. §5841. It is declared to be unlawful to possess any firearm that has been made or transferred in violation of the other provisions of the act, or that has not been

[1] There are additional requirements under the making and transfer provisions of the aet besides the required payment of the corresponding tax. Under §5821, the person subject to the tax imposed by §5821(a) must: (1) declare in writing prior to making such firearm his intention to make a firearm; (2) affix to the original of such declaration the stamp described in §5821(d); (3) file the original declaration and a copy thereof; and (4) if the maker of the firearm is exempt from the tax, submit the report required by §5821(b) notifying the government of same.

Under the provisions applicable to a transfer of the firearm, the person transferring a firearm must: (1) execute a written order on an application form issued by the Secretary of Treasury as provided in §5814; (2) affix to such order a stamp as provided in §5813; (3) in case of exportation of the firearm, follow the procedure prescribed in §5844; (4) if the transfer is exempt under §5812(a), give notice of such exemption as provided by §5812(b); and (5) comply with the laws pertaining to assessment, collection, remission and refund of taxes, the engraving, issuance, sale, accountability, cancellation and distribution of tax-paid stamps, and "all other provisions of the internal revenue laws" not inconsistent with the provisions of Chapter 53, as referred to in §5846.

registered. 26 U.S.C. §5851. Finally any person who violates any of the requirements of the act is subjected to substantial criminal penalties. 26 U.S.C. §5861.

The registration provision of §5841, and the incorporation by reference of that provision in the possession or enforcement section, §5851, cannot be reconciled with the privilege against self-incrimination. The registration provision purports to reach "every person possessing a firearm," but the second sentence of §5841 states that registration is not required if the provisions of the act with regard to making or transfer were complied with when the possessor made the gun or acquired it by transfer. It is difficult to conceive of one possessing a firearm that he has not either made or acquired by transfer, especially in light of the expansive definition given to "transfer" for purposes of the act. 26 U.S.C. §5848(10).[2] Thus, in effect, §5841 requires registration only if the possessor has failed to comply with those portions of the act dealing with making or transfer. But §5851 makes it a crime to possess a firearm "which has at any time been transferred * * * or which has at any time been made" in violation of the making or transfer provisions. Therefore, only those persons whose possession of a gun would be a crime under §5851 are required to register under §5841.

Thus take the case of a person who has made a "firearm," as defined in the act. If he pays the tax and complies with the other procedures required by §5821, he has done all that federal law demands of him. He is not required to register under §5841, because of the exclusion from the

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[2] 26 U.S.C. §5848(10) provides that: The term "to transfer" or "transferred" shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of.

registration requirement in the second sentence of that section. His possession is not unlawful under §5851, since the weapon was not made in violation of §5821, and registration was not required by §5841. If the maker then transfers the gun to someone else, and complies with the transfer provisions of §§5811–5814, again neither the maker nor the transferee are required to register under §5841 nor is the transferee's possession unlawful under §5851.

The case is very different if the maker has not complied with the requirements in §5821 about making firearms (and a similar analysis applies if a firearm is made in compliance with §5821 but later transferred without complying with the transfer provisions). In this instance since the maker is a "person possessing a firearm" within §5841, he is required by that section to register. He has also violated §5851 in two respects: he is the possessor of a firearm that has been made in violation of §5821, and he is the possessor of a firearm that has not been registered as required by §5841. If he registers he is no longer guilty of the second violation of §5851, but he confesses his guilt of possession of a firearm unlawfully made.

Registration of possession under §5841 not only provides "a link in the chain of evidence," *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), by which an individual might be convicted under §5851, but it furnishes the government with a prima facie case, since under the last sentence of §5851 "possession shall be deemed sufficient evidence to authorize conviction * * *."

The Ninth Circuit perceived this in the leading case of *Russell* v. *United States*, 306 F.2d 402 (9th Cir. 1962). Since "Russell could make no report under Section 5841 without admitting an actual or presumptive violation of

law," *id.* at 409, it held that prosecution for failure to register under §5841 was unconstitutional. Every other court that has considered the same problem upon its merits has reached the same result. *Dugan* v. *United States,* 341 F.2d 85 (7th Cir. 1965); *McCann* v. *United States,* 217 F.Supp. 751 (D. Colo. 1963); *United States* v. *Fleish,* 227 F.Supp. 967 (E.D. Mich. 1964). In the court below in the present case the United States took the view that the *Russell* case had "quite properly" reached this result. Brief for United States, p. 3. The reasoning of the *Russell* case has been persuasive also to other courts dealing with similar problems. *Lovelace* v. *United States,* 357 F.2d 306, 307-309 (5th Cir. 1966); *Communist Party of the United States* v. *United States,* 331 F.2d 807, 813 (D.C. Cir. 1964).

The rationale of *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), that the privilege against self-incrimination has no relation to future acts, is not applicable to the registration requirements of §5841. Clearly, the disclosure compelled by §5841 relates only to past acts or omissions. "Every registration in compliance with Section 5841 inevitably incriminates the registrant. Each registration inevitably declares, not an intention to act, but current criminal activity". *United States* v. *Fleish,* 227 F.Supp. 967, 972 (E.D. Mich. 1964). Likewise, *United States* v. *Sullivan,* 274 U.S. 259 (1927), is not controlling. In *Sullivan,* this Court upheld a conviction for failure to file an income tax return on the theory that "if the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." *Id.* at 263. But Form 1, the form provided by the gov-

ernment for registration under §5841, cannot be used in any way without incriminating the person who files it. The form is reproduced in Appendix B at p. 29. The act of registering under §5841 is necessarily incriminating whether or not any information other than the registrant's name is supplied.[3] Furthermore, in *Sullivan,* the questions in the income tax return were directed to the public at large, while here, as in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), "they are directed at a highly selective group inherently suspect of criminal activities" and "in an area permeated with criminal statutes." *Id.* at 79. In addition, while the requirement of filing an income tax return may be predicated upon a valid governmental interest in collecting the tax other than the compulsion of some incriminating information, "Section 5841 differs from the provisions requiring the filing of income tax returns in that the only major effect of Section 5841 is to produce incriminating information," *United States* v. *Fleish,* 227 F.Supp. 967, 970 (E.D. Mich. 1964). It does not suffice to say that an individual who has chosen to come into possession of a firearm the registration of which is required by §5841 has done so voluntarily and has thereby relinquished his privilege against self-incrimination. Such an argument may have application to a threshold admission relating to prospective activity, *Lewis* v. *United States,* 348 U.S. 419, 422-423 (1954), but not to a present or past status, *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965). Carried to its logical conclusion, the "voluntariness" argument would

[3] *Fleish* v. *Johnson,* 145 F.2d 16, 17 (9th Cir. 1944), indicates that nothing less than literal and full compliance with the requirements of §5841 [then §3261(b)] is permitted. See *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 75 (1965).

make serious inroads upon the privilege against self-incrimination. Although a person may have a free choice in the commission of a crime, the "voluntary" nature of such a choice has never been thought to defeat that person's privilege against being compelled to testify as to the crime.

If it is unconstitutional to prosecute the possessor of a firearm under §5841 for failing to register it, it would seem equally unconstitutional to prosecute a person for possession of a firearm that has not been registered under §5841. However, a strange distinction has been developed by the lower courts. Such a prosecution, first authorized by a 1958 amendment of §5851, has usually been held permissible. This distinction was first developed by the Ninth Circuit,[4] affirming a §5851 conviction and distinguishing *Russell* in three sentences. *Frye* v. *United States,* 315 F.2d 491, 494 (9th Cir. 1963). This distinction was expanded to a full paragraph by the same judge two weeks later in *Starks* v. *United States,* 316 F.2d 45, 46 (9th Cir. 1963), where the court said:

> the defendant was not charged with failing to register the weapon, as was the defendant Russell, but was charged with possession of an unregistered weapon. Section 5841, considered in Russell, makes it an offense to fail to register, and we held in Russell that to that extent, it is invalid. It is the possession of a gun that

[4] The distinction was anticipated by a district court within the Ninth Circuit, but on grounds different from those later adopted by the court of appeals, in *Hazelwood* v. *United States,* 208 F.Supp. 622 (N.D.Cal.1962). See note 6 below. Prior to development of the distinction by the Ninth Circuit, however, another district court arrested judgment on §5851 counts, on motion of the government, in *United States* v. *Mares,* 208 F.Supp. 550 (D.Colo.1962).

> no one has registered, not the failure by appellant to register, that is the essence of the offense with which appellant was charged in this case. Appellant did not have to accept or acquire possession of the gun, and when he did so, that gun not having been registered by any one, the offense was complete.

This distinction has been accepted by the Sixth, Eighth, and Tenth Circuits, and by two district courts, as well as by the Fifth Circuit in the instant case. *Pruitt* v. *United States,* 364 F.2d 826 (6th Cir. 1966); *Sipes* v. *United States,* 321 F.2d 174 (8th Cir. 1963) (dictum); *Taylor* v. *United States,* 333 F.2d 721 (10th Cir. 1964); *Castellano* v. *United States,* 350 F.2d 852 (10th Cir. 1965); *United States* v. *DePugh,* 266 F.Supp. 417, 422-423 (W.D. Mo.1967); *Capooth* v. *United States,* 238 F.Supp. 583 (S.D. Tex. 1965).

There is a further refinement of the distinction, applied by the Fifth Circuit. *Lovelace* v. *United States,* 357 F.2d 306 (5th Cir. 1966), was a §5851 prosecution, but the indictment there charged the defendant with possession of a firearm "which had not been registered by the defendant." In the cases upholding convictions under §5851, as in the present case, the indictments or informations involved had alleged only that the defendants in those cases possessed a firearm "which firearm had not been registered." This pleading difference the Fifth Circuit thought crucial. Since the indictment in the *Lovelace* case required proof that the defendant himself had not registered the gun it had "applied section 5851 in an unconstitutional manner." *Id.* at 309.

The *Starks* distinction is based upon the premise that a prosecution under §5841 charges a defendant with his own

failure to register, and cannot stand since registration necessarily incriminates him, while a prosecution under the non-registration provisions of §5851 rests on "the possession of a gun that no one has registered, not the failure by appellant to register." *Starks* v. *United States*, 316 F.2d 45, 46 (9th Cir. 1963).[5] The further distinction drawn by the Fifth Circuit apparently means that "the government in order to avoid conflict with the privilege need only be careful to draw the indictment vaguely in regard to who failed to register under §5841." Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup.Ct.Rev. 103, 159 n. 95.

The distinction provides a way for the government to achieve indirectly that which it is forbidden to do directly by the Fifth Amendment. The distinction has been repeatedly criticized. "The possession of an unregistered firearm prohibition operates as a method of enforcing the registration requirement. If the registration requirement violates the fifth amendment, the possession prohibition should also." Comment, *Self-Incrimination and Registration Statutes: A Case Against Constitutionality*, 4 Houston L. Rev. 507, 510 (1966). See also Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 158 n. 95; Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Col. L. Rev. 681, 690 n. 70 (1965).

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[5] Such a distinction ignores the possible inseparability of §5851 from §5841. It would appear that holding §5841 unconstitutional would prove fatal to the unregistered firearm clause of §5851 since the two provisions are interdependent and incapable of separation.

On its face, the rationale of the *Starks* line of cases contemplates that an offense charged under §5841 is separate and distinct from one under §5851 since under §5851 "the offense is the possession—not the failure to register." *Castellano* v. *United States,* 350 F.2d 852, 854 (10th Cir. 1965). In actuality, §5851 is no more than a mirror image of §5841, intended merely "to simplify and clarify the law and to aid in prosecution." S. Rep. 2090, 85th Cong., 2d Sess. (1958). The identity of the two provisions was implied by the Court in *Russell* v. *United States,* 306 F.2d 402, 407 n. 11 (9th Cir. 1962), advocated by the government's brief on appeal in the same case, *id.* at 406, and indicated by the position the government took in *United States* v. *Mares,* 208 F.Supp. 550 (D. Colo. 1962), when it moved to dismiss the §5851 counts "on the ground that the *Russell* case controls." *Id.* at 551.

There are further reasons why such a distinction is invalid. First of all, it would seem that the government, at a minimum, would have to prove possession by someone other than the defendant who was under an obligation to register, Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 158 n. 95, since only a possessor may register under §5841.[6] Furthermore, the burden would be on the government to show that such a prior possessor could have registered without incriminating himself, or without having a privi-

[6] Prior to *Starks* a district court had upheld §5851 on the theory that "the party may register the gun prior to possessing it and thereby avoid an act which would, as in Russell, by registering after possession, violate his Fifth Amendment rights." *Hazelwood* v. *United States,* 208 F.Supp. 622, 623 (N.D.Cal.1962). But this is in the teeth of §5841 and of the registration form, reproduced p. 29 below.

lege against incrimination, as if the prior possessor were a corporation. Unless the government can prove that there was some person entitled to register, and who could have registered without violating his constitutional privilege, the prosecution must fail. *Communist Party of the United States* v. *United States,* 331 F.2d 807 (D.C. Cir. 1964); *Communist Party of the United States* v. *United States,* 35 U.S.L.Wk. 2509 (D.C. Cir. 1967); cf. *Heikkinen* v. *United States,* 355 U.S. 273 (1958). There is no indication in the cases that the government has ever made such a showing.

There is an even more serious flaw in the distinction suggested by *Starks.* Section 5851 makes it unlawful to possess "any firearm which has not been registered as required by Section 5841." Section 5841 requires registration by "every person possessing a firearm." Prior compliance with the provisions relating to transfer, importation, or making, obviates the need for registration, as the second sentence of §5841 declares, but prior registration does not. This is clear on the face of the statute, and it was so held in *Crapo* v. *United States,* 100 F.2d 996 (10th Cir. 1939). It was decided there that if a gun is in the joint possession of two persons, registration by one would not satisfy the duty of the other possessor also to register.

Although a district court in *United States* v. *DePugh,* 266 F.Supp. 417, 423 (W.D.Mo.1967), ruled, without stating any reasons, that registration by a prior possessor made it unnecessary for the present possessor to register, the contrary holding in *Crapo* seems surely right. The statutory obligation to register is imposed on "every person possessing a firearm." The relevant Treasury Regulation spells the point out beyond cavil. "Every person in

the United States possessing a firearm (a) not registered to him * * * " is required to register. Treas. Reg. §179.120. Even if a firearm has been registered by a prior possessor, the present possessor must register because it is not registered "to him."

In a prosecution under this clause of §5851 possession of a firearm not registered as required by §5841 is an essential element. *Bryan* v. *United States,* 373 F.2d 403, 406 (5th Cir. 1967); *Frye* v. *United States,* 315 F.2d 491, 494 (9th Cir. 1963). If the present possessor has not registered, then the firearm "has not been registered as required by Section 5841" and he is guilty of a violation of §5851, even though someone else has registered the firearm in the past. On this view there is no substance to the distinction developed in *Starks* and *Lovelace* and the other cases, and a defendant's privilege against self-incrimination is as much violated by an indictment or information drawn in terms of the non-registration provision of §5851 as by one drawn in terms of §5841. The distinction is logically meaningless.

In its Brief in Opposition to Certiorari, the United States offered a somewhat different, but no more substantial, distinction in support of the decision below and the cases on which it relied. The United States apparently accepted the holdings in both *Russell* and *Lovelace,* conceding that "the prosecution, no matter how styled, actually was for failing to register." Brief in Opposition, p. 4 n. 4. It argued that no affirmative declaration is required by a defendant that may implicate him in another crime, that the failure to register is not the essence of the crime, and that the critical fact is "his failure to make certain, at the time he accepts possession, that there is a legal

'chain of title' in existence." *Ibid.* To this there is a short answer. If the person taking possession of the firearm checks with the Treasury Department and finds that there is a legal chain of title in existence, including a record of its transfer to him, he is exempted from the registration requirement by the second sentence of §5841, and no prosecution will lie under the portion of §5851 here in issue. Only if the weapon has at some point been made or transferred in violation of other provisions of the act and there is no sufficient chain of title does the registration provision come into play. It does then require an affirmative declaration, sufficient to incriminate the person under the other clauses of §5851, that he possesses a firearm that has been made or transferred unlawfully. If, and only if, he refuses to convict himself out of his own mouth by registering the weapon can he be convicted under this clause of §5851.

The language of §5851 here in question was added to that section by Congress in 1958. Act of Sept. 2, 1958, Pub.L. 85-859, Tit. II, §203(h)(1), (2), 72 Stat. 1428. It cannot even be justified by the necessities of law enforcement. In every case in which a person possesses a firearm not registered as required by §5841, the firearm must, by hypothesis, have been made or transferred in violation of the making and transfer provisions, since if those other provisions have been complied with registration is not required under §5841. Thus any person who could be prosecuted under the registration clause of §5851 could be prosecuted under the making or transfer clauses of that section as they stood prior to the 1958 amendment. In *Waters* v. *United States,* 328 F.2d 739 (10th Cir. 1964), the government voluntarily dismissed an indictment under

the registration clause of §5851, apparently thinking it was unconstitutional, and immediately filed a new information based on possession of the same firearm but invoking the making clause of §5851. See also *United States* v. *Mares,* 208 F.Supp. 550 (D.Colo.1962), affirmed 319 F.2d 71 (10th Cir. 1963), where conviction on counts charging possession of unregistered firearms under §5851 was set aside on constitutional grounds, while conviction of violating §5851 with regard to the same weapons but asserting that they were made in violation of §5821 was upheld. Indeed the indictment in this very case (R. 3-4) shows how totally unnecessary the registration clause of §5851 is for law enforcement. Its only effect is to trivialize the guarantees of the Fifth Amendment.

"So long as the self-incrimination clause of the Fifth Amendment endures, activity may be made criminal, but the actor cannot be compelled to characterize it as such and to disclose it. If Congress would do the one, it may have to forego the other. The choice by Congress of the means it believes more effective remains with it." *Communist Party of the United States* v. *United States,* 35 U.S.L.Wk. 2509 (D.C.Cir.1967). If Congress wants to compel disclosure of firearms made or transferred in violation of law, then it cannot make it criminal to possess such a firearm.

The decisions holding §5841 unconstitutional are right, since that statute requires self-incrimination. The registration clause of §5851 purports to punish persons for refusing to incriminate themselves under §5841. This Congress cannot do.

Conclusion

The judgment below should be reversed with instructions to dismiss Count II of the information.

Respectfully submitted,

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